APPENDIX A.

Analysis of various cases in Federal courts involving annulment, suspension, revocation or denial of permits under the Federal Alcohol Administration Act, and contrast of these cases with the instant case.

In *Atlanta Beer Distributing Company, Inc.* v. *Alexander, Federal Alcohol Administrator* (1938), 93 F. (2) (certiorari denied, 303 U. S. 644), petitioner applied for a permit to engage in the business of purchasing at wholesale wine and malted liquors, etc. The hearing officer recommended denial of the application. Exceptions were filed and overruled by the Administrator.

The President-Treasurer of the Corporation had a criminal record consisting of five convictions in State and Federal courts. It was on this ground that the Administrator denied the application for a permit, saying "that the corporation was not likely to maintain its operations in conformity to federal law." The majority opinion of the Court stated that:

> "No objection to the order shall be considered by the court unless it shall have been urged before the Administrator, or there were reasonable grounds for failure so to do."

In contrast, in the instant case the question was (1) not the consideration of the *issuance* of basic permit No. 13-P-37, but the *annulment* of this permit issued approximately three years before; (2) applicant and his associates had never been convicted of a felony or misdemeanor in a Federal or State court nor had they had a suspension of a license.

Judge Hutcheson in his dissenting opinion uttered words that could well be considered in the instant case, when he said (p. 13):

> "The result of the action of the Administrator, therefore, in, as appellant claims, arbitrarily refusing a

permit is not to prevent applicant's entering into new business, *but it is to take from it* and destroy the established business and capital which it has already built up * * * I think that under the facts disclosed, the Administrator could not deny the permit except upon the clearest showing that one of the statutory grounds for refusing it existed." (Italics supplied.)

In *Arrow Distilleries* v. *Alexander* (1940), 109 F. (2) 397, (certiorari denied, 310 U. S. 646) the petitioner's license was suspended because (1) he had falsified certain records which were to be kept by the holders of basic permits; (2) misbranded bottles of whiskey by misdating their age; (3) sold spirits in bottles in interstate commerce for which the petitioner had received no certificate of label approval. Note that the permits were *suspended* but *not annulled,* so that the petitioner had the opportunity of rectifying any violations without having its business and assets destroyed.

In contrast, in the instant case, there is no substantial testimony showing that after the granting of basic permit No. 13-P-37 to officers of a court they knowingly and intentionally violated the law or regulations. The acts for which they were charged during that period such as "exclusive outlet" control and "tied house" inducements as in Sections 5a and 5b of the Act (U. S. C. A. Section 205(a) and (b) respectively), were certainly not as offensive to the law as were those in the above case. Nevertheless, the Supervisor did not *annul* the permit in the above case.

In the case of the *Middlesboro Liquor and Wine Company, Inc.* v. *Berkshire* (1942), 133 F. (2) 39, 77 U. S. App., D. C. 88, the facts were that a wholesaler's basic permit was issued to appellant. Four years later it was annulled, and appeal taken to the U. S. Court of Appeals for the District of Columbia. The appellant's permit was procured through fraud and concealment and misrepresentation of a material fact in that the true interest of Floyd Ball, the principal stockholder, member of its Board of Directors and Secretary-Treasurer was concealed, he being a person

with a criminal record, who had not divested himself of an interest in the Company.

In arriving at its decision the Court went very thoroughly into the record.

In the opinion, Justice Miller made a distinction between annullment proceedings and those for suspension or revocation. Referring to the limitations of Section 4(i) of the Act he said:

> "However, those limitations have no relation to annullment proceedings. They are specifically confined to proceedings for suspension or revocation. This is even more clearly shown by reference to Section 4(e) in which the three distinct types of disciplinary action are enumerated and defined. An entirely different situation exists when it appears that a permit has been procured by fraud, misrepresentation or concealment than when a permit has been properly procured but has been improperly used. Proceedings to suspend or revoke are concerned with nonuser or *misuser after the granting of the permit.*" (Italics supplied.)

In contrast, in the instant case, (1) there was no criminal record to consider; (2) the application for permit was made by the permittees, officers of a Court; (3) there was no substantial evidence that could be applied to these officers, not ony because Mr. Ray E. Levers, against whom most of the evidence was given, was dead, but because the applicants were either new or had completely changed their position and approached the Unit as officers of the Court, ordered by a Court to carry on the business. Therefore, the District Supervisor should in no sense have considered the case as one calling for annullment but, if at all, following the distinction made by Justice Miller, one of misuser after the granting of the permit.

In the case of *Monarch Distributing Company* v. *Alexander, et al.* (1941), 119 F. (2) 953, the question was the *refusal to grant* petitioner a basic permit. At the hearing on the application, subsequent to the date of the original petition but prior to final amendment thereof, it appeared that

petitioner and certain of its successive presidents had been convicted in the U. S. District Courts of felonies and misdemeanors. The only question involved was whether these convictions, secured after the date of filing the original petition, were a bar to the issuance of the permit, in view of the fact that the statute prohibits permits only to persons convicted "within five years prior to date of application." The court held that it was immaterial when the conviction occurred so long as it was within five years.

In contrast, in the instant case (1) the basic permit had already been issued, so the value of a going business was involved; (2) there was no question of criminal records; (3) applicants were in a totally different position from those in the above case and, if any correction of their acts was needed, it could have been handled easily under a suspension and not an annullment of a business that was within the active jurisdiction, control and supervision of a Court.

In the case of *Peoria Braumeister Company* v. *Yellowley*, (1941), 123 F. (2) 637 the basic permit to engage in sale and distribution of intoxicating liquors was *suspended*—not annulled. The charge was falsifying records and failure to keep records at its place of business. The case does not state in what respect petitioner falsified.

The position of the Government was that the respondent had no right to appeal to the court until it had exhausted its remedies before the Commissioner and the Department, as provided by the regulations.

In contrast the same charge is made in the instant case as in the above case, to wit, that the petitioner falsified its record. Yet the Commissioner on such a charge did not annul but only suspended the permit and thus gave the applicant an opportunity of correcting any mistakes or wrongs and not destroying the business of the petitioner outright.

In the case of *Malloy & Company* v. *Berkshire, et al.* (1944) (2nd Circuit) 143 F. (2) 218, (certiorari denied, 323 U. S. 802) the charge was that the dealer's basic permit

was procured by fraud and misrepresentation and concealment of material facts that justified annulling the permit. A questionnaire required the Corporation to state the amount of capital stock, addresses of directors, officers, stockholders, etc., whether the applicant was a successor or under substantially the same control or financed by substantially the same interests; the source of funds invested, the name and addresses of persons who held or were expected to hold a substantial interest.

Four of the stockholders who were officers and directors had been engaged in bootlegging during the prohibition years. The respectable names of Thomas J. Malloy, President, and one Bomzon, were being used as a front. Neither one had ever actually put any money into the Corporation, whereas four bootleggers were the real financiers.

The Court held that the hearing officer had ample justification for holding that there were concealments and misrepresentations that were material, because the money supplied and the principals had been connected with the bootleg business and that this had not been disclosed. The Court further said that the Administrator had the right to know with whom he was dealing.

In contrast in the instant case, the Alcohol Tax Unit knew that those applying for the permit were officers of the Court. Neither they nor their predecessors had had any bootlegging record nor had been found guilty of a felony or misdemeanor either under the Federal or State laws.

In the case of *Straus* v. *Berkshire* (1943), 132 F. (2) 530, the question was whether the Deputy Commissioner of Internal Revenue had the authority to *suspend* the permit for a period of ninety days. The permittee asserted (1) that the amount of the suspension was too great for the offense, (2) that the suspension for three months amounted to a revocation of the permit.

Permittee had failed to present any basis in the record for showing that the suspension was unreasonable, arbitrary and capricious. Nevertheless, the permittee sought to

have the case sent back to the administrative officer in order to introduce evidence to show that the suspension amounted to revocation.

In contrast the instant case (1) calls for complete annulment and not suspension; (2) the annulment in the instant case would mean complete annihilation of the business; (3) the record in the instant case does, under the circumstances, show the order to be unreasonable, arbitrary and capricious in that the application was made by officers of the court who were under the control of the court, whose record was clear of crime or misdemeanor and whose actions, if in any way wrong, could have been corrected during a suspension period; all of which was evident from the record.

In the case of *Leebern* v. *United States* (1941), 124 F. (2) 505, the facts were that the petitioner violated the provisions of Section 5 (b) of the Act by furnishing money to retail liquor dealers to buy licenses, endorsing and guaranteeing their notes, acquiring and holding an interest in their licenses, acquiring an interest in real and personal property owned, occupied and used by them in the conduct of their business, furnishing money, renting and selling them equipment, fixtures, supplies, etc., all of which was done to prevent other persons from selling to these retailers. For these violations the permit was suspended for *only* sixty days. The court held that:

> "It functions as a tribunal of last resort set up in the statute itself for correction of errors of law committed and not corrected, in the course of the administrative procedure."

In contrast, let us assume in the instant case, that the transcript shows a case as strongly and frequently violative of the law as in the *Leebern* case. Nevertheless, the District Supervisor did not annul the permit but only suspended it for sixty days.

In *Owens Mills Distillery Inc.* v. *Helvering* (1941), 124 F. (2) 379, with the exception that the existing permit was revoked and applications for new permits denied, there is no

resemblance whatsoever to the situation and facts presented, with those in the instant case. In the Owens Mills case, the petitioner corporation, and its former president Lansburgh, who was its principal stockholder, and his son, were convicted of violations of the Federal liquor laws on July 3, 1940.

Lansburgh then sold his stock and that of his family to James Pollack and Benjamin Lerner and others. Pollack and Lerner and their group thus became the principal stockholders and controlled the corporate elections.

The sole question involved was whether or not the denial of petitioner corporation's applications for permit was proper, upon the basis of the findings of the direct supervisor.

In the Owens Mills case there are the following facts: (1) A corporation with its president and controlling stockholders convicted of violation of the law; (2) The president then transfers the stock of his group to a group of crooked stockholders in the same corporation who thereby gain control of the corporation; (3) These latter crooked stockholders had been convicted of violations of the law. Pollack had been convicted sixteen times of violations of the liquor law, and Lerner had also been convicted; (4) Their record was open and notorious; (5) Pollack and Lerner had attempted to bribe the government investigators and had threatened them and their jobs with extinction and the use of political power; (6) The only change in the status of the corporation was that one group of crooked stockholders sold out to another group when the government had annulled the license. So there was a continuing line of crookedness in the corporation.

In contrast, the instant case shows the following: (1) The petitioner had not been convicted of violation of a Federal or State law; (2) The petitioner had, during all the time in question, owned two state licenses; (3) The State had a liquor law that covered all transactions in intra-state commerce; (4) The petitioner was a duly appointed, bonded

and qualified *officer of a State Court of Competent jurisdiction.* He was ordered to carry on the business and to report to the State Court regularly. If "exclusive sale" or "tied house" contracts existed they did so under the jurisdiction and control of the State Court and were thereby freed of the color of violation. All of these facts were known publicly, and the supervisor himself had been the one that recommended that the administrator of the Court should apply for the new licenses, after the death of Ray Levers, a brother of Forest Levers and a partner; (5) There was a change of position and control on the part of those supervising the partnership assets.

APPENDIX B.

A. The Act.

The Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 201) provides in part as follows:

SEC. 3. * * * (a) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—

(1) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.

* * * * * * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

* * * * * * * * *

SEC. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experi-

ence financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

* * * * * * * * *

(d) A basic permit shall be conditioned upon compliance with the requirements of section 5 (relating to unfair competition and unlawful practices) and of section 6 (relating to bulk sales and bottling), with the twenty-first amendment and laws relating to the enforcement thereof, and with all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator find that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

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(g) A basic permit shall continue in effect until suspended, revoked, or annulled as provided herein, or vol-

untarily surrendered; except that (1) if leased, sold or otherwise voluntarily transferred, the permit shall be automatically terminated thereupon, and (2) if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock-ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Administrator.

(h) An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon the Administrator, or upon any officer designated by him for that purpose, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. The finding of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in

such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Administrator's order.

* * * * * * * * *

SEC. 5. It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) *Exclusive outlet:* To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) *"Tied house":* To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt bev-

erages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Administrator shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Administrator and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

APPENDIX C.

NEW MEXICO STATUTES OF 1941 ANNOTATED VOLUME 5.

61-504. Wholesalers' license—No wholesaler shall sell, or offer for sale, any alcoholic liquors to any person other than the holder of a New Mexico wholesaler's, retailer's, dispenser's or club license (New Mexico Statutes, 1941).

61-514. Persons prohibited from receiving licenses—"(a) The following classes of persons shall be prohibited from receiving licenses under the provisions of this Act: (1) Persons who have been convicted of two (2) separate misdemeanor violations of this Act in any calendar year or of any felony, except those persons restored to civil rights." * * *.

61-518. No such wholesaler shall sell, offer for sale, or ship, any alcoholic liquors not received at, and shipped from, the premises specified in such wholesale license, except beer as provided in Section 705.

61-911. * * * *Exemptions.* (C)(4) "spirituous liquors, beer or wine to be sold by any officer under the order or direction of any court."

61-912. *Quitting business or death of licensee*—Sales to other dealers or dispensers without liability—In case any retailer, dispenser or club shall quit business for any reason, or in case of the death of any such licensee, the stock of liquors owned at the time of such quitting of business, or at the death of such licensee, may be sold in whole or in part to any other retailer, dispenser or club or to any New Mexico wholesaler without the seller thereof incurring any criminal or civil liability under the provisions of this Act (Laws 1939, ch. 236, Section 1501, p. 566).

61-914. Return to wholesaler or non-resident licensee is not a sale.—No return of, or repossession of, any stock of, or part of any stock of, alcoholic liquors to, or by, any licensed New Mexico wholesale liquor dealer shall be construed as a sale within the meaning of any provision of this Act. The same rule shall apply in case of the return or repossession of any alcoholic liquors to, or by, a non-resident licensee, by or from any New Mexico wholesale liquor dealer (Laws 1939, ch. 236, Section 1503, p. 566).